BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SHERIDAN BURLEY, JR.	)	
Claimant	)	
VS.	)	
	)	Docket No. 213,265
MAX RIEKE & BROTHERS, INC.	)	
Respondent	)	
AND	)	
	)	
CNA	)	
Insurance Carrier	)	

ORDER

Claimant appeals from an Award entered by Administrative Law Judge Julie A. N. Sample on November 7, 1997. The Appeals Board heard oral argument April 21, 1998.

APPEARANCES

Davy C. Walker of Kansas City, Kansas, appeared on behalf of claimant. Timothy G. Lutz of Overland Park, Kansas, appeared on behalf of respondent.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ found claimant has a 16 percent general body disability based on functional impairment. She denied work disability on the grounds that the only evidence of the extent of work disability was that presented by respondent. She determined that the claimant had, therefore, not met his burden. On appeal, claimant contends the ALJ should have considered all the evidence and argues that when all evidence is considered he is entitled to a work disability. Respondent argues that the award should be affirmed. The Board notes respondent did not argue, at least in it submission letter, that the ALJ should consider only the evidence presented by the claimant but does argue in support of this position on appeal.

In the application for review, claimant also listed a claim for additional temporary total disability benefits. At the time of oral argument, claimant's counsel withdrew this issue.

Finally, the ALJ found the average weekly wage to be high enough for the maximum benefit but, because she awarded no work disability, did not find a specific wage. If the Board awards work disability, it would be necessary to determine the wage in order to calculate the wage prong of the work disability formula.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds the Award should be modified to one for 58 percent work disability.

Findings of Fact

1. Claimant, a construction truck driver for the last 21 years, was injured on April 13, 1995, when the wheel of the truck he was driving dropped off a scale platform. The steering wheel abruptly turned, jerking his left hand, and pinning his arm between the dash and the steering wheel.

2. Claimant received treatment first at the direction of Dr. Gregory Bono at the Business and Industry clinic. The treatment included physical therapy and then surgery for a left wrist ulnar styloid fracture in December 1995.

3. Claimant returned to work in July 1996 but continued to have problems. In September 1996, Administrative Law Judge Alvin E. Witwer appointed Dr. Terrence Pratt to provide treatment. Dr. Pratt diagnosed cervical myofascial pain with involvement of the left trapezius and possible peripheral nerve involvement. Dr. Pratt ordered a nerve conduction study and the results were consistent with entrapment of the ulnar nerve at the elbow. Dr. Pratt also referred claimant to Dr. Neal D. Lintecum for evaluation. Dr. Lintecum found nonunion at the previous surgical site but indicated further surgery was not recommended. In December 1996, Dr. Pratt determined claimant had reached maximum medical improvement and recommended restrictions. Specifically, he recommended:

> Maximum lifting 20-lbs below the waist level, 15-lbs waist-to-shoulder level, and 10-lbs overhead. I also recommend use of the left wrist cock-up splint during vocational activities. I also would not recommend driving an 18-wheeler construction truck.

4. In February 1997, Dr. Pratt rated claimant's impairment as 20 percent of the left upper extremity with an additional 4 percent of the whole person for involvement of the

cervical region. He combined the ratings to arrive at a total impairment of 16 percent of the whole body.

5. Dr. Pratt reviewed a task analysis prepared by Mr. Gary Weimholt. Mr. Weimholt had applied Dr. Pratt's restrictions to 21 tasks claimant had done in work during the previous 15 years and concluded claimant could not do 8, or 38 percent, of those tasks. Dr. Pratt agreed with Mr. Weimholt's conclusions. Dr. Pratt also advised claimant he would not be able to return to the work he was doing for respondent.

6. Mr. Weimholt also concluded claimant could earn $200 per week within Dr. Pratt's restrictions.

7. Mr. Michael J. Dreiling also provided a task analysis opinion. But no physician testified in support of that opinion.

8. The evidence indicates claimant could not return to his regular work for respondent and respondent did not offer accommodated work. Claimant was not working at the time of the regular hearing. But the record does not indicate that claimant has made a good faith effort to obtain other employment since leaving work for respondent.

9. Dr. Ronald Zipper evaluated claimant at the request of claimant's counsel. He rated the impairment at 38 percent of the whole body based on impairment which includes the wrist, elbow, shoulder, and cervical area. Dr. Zipper gave no opinion on task or wage loss except to state that he did not feel claimant could return to his truck driving for respondent.

10. At the time of the accident, claimant earned $15.31 per hour and was a full-time employee. His base wage was, therefore, $612.40 per week. He earned a total of $1,791.68 in overtime for the 26 weeks before the accident for an average of $68.91 per week. Claimant also earned $5.58 per hour in fringe benefits and the total fringe benefits payment during the 26 weeks before the accident was $5,421.53, or $208.52 per week. The fringe benefits were terminated effective June 1997.[1]

Conclusions of Law

1. Claimant has the burden of proving his/her right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 44-501(a).

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[1] Not all fringe benefits are added to the wage as "additional compensation" under K.S.A. 44-511. The record does not show precisely what the benefits were in this case but does indicate they included health insurance and pension which are "additional compensation." Respondent initially objected that the fringe benefit might not have been terminated but did not otherwise object to including the fringe benefits as part of the wage. The record reflects the benefits were stopped in June 1997, and the Board has included the full amount of the benefits in the wage calculation.

2. The Appeals Board disagrees with the conclusions by the ALJ that only evidence presented by the claimant is to be considered when determining whether claimant has met his burden. The Board concludes that all the evidence in the record, including that presented by respondent, should be considered to determine whether the burden is met. The Workers Compensation Act contains no provision for summary judgement or for decision at the conclusion of claimant's evidence. K.S.A. 44-501(a) requires the finder of fact to consider the whole record. K.S.A. 44-508(g) defines "burden of proof" and that statute specifically requires the fact finder to make its determination on the basis of the whole record. The Board will, therefore, consider all evidence presented, including the evidence presented by respondent, to determine whether claimant has proven a work disability.

3. After the injury, claimant was not able to return to a job earning a wage which was 90 percent or more of his preinjury wage and claimant is entitled to a work disability. K.S.A. 44-510e.

4. K.S.A. 44-510e(a) defines work disability as the average of the wage loss and task loss:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

5. The wage prong of the work disability calculation is based on the actual wage loss only if claimant has shown good faith in efforts at obtaining or retaining employment after the injury. Claimant may not, for example, refuse to accept a reasonable offer for accommodated work. If the claimant refuses to even attempt such work, the wage of the accommodated job is imputed to the claimant in the work disability calculation. *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). Even if no work is offered, claimant must show that he/she made a good faith effort to find employment. If the claimant does not do so, a wage will be imputed to claimant based on what claimant should be able to earn. *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

6. Because claimant did not make a good faith effort to find employment after the injury, the Board must determine what wage claimant has the ability to earn. *Copeland v. Johnson Group, Inc.* Based on the testimony of Mr. Weimholt, the Board finds claimant has the ability to earn $200 per week.

7. Claimant's preinjury wage was $889.83, including a base wage of $612.40, average overtime of $68.91, and additional compensation of $208.52. The Board rejects respondent's argument that claimant's preinjury wage should not use a 40-hour week because claimant's work was seasonal. K.S.A. 44-511 distinguishes between full-time and part-time employees but makes no special provision for seasonal employees. As a full-time employee, claimant's base wage is computed for 8 hours per day, 5 days per week, or 40 hours per week.

8. Claimant's post-injury ability of $200 per week is 78 percent less than the $889.83 per week he earned before the injury.

9. Based on the testimony of Dr. Pratt, the Board finds claimant has a task loss of 38 percent.

10. Claimant has a work disability of 58 percent based on a wage loss of 78 percent and a task loss of 38 percent. K.S.A. 44-510e.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Julie A. N. Sample on November 7, 1997, should be, and the same is hereby, modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Sheridan Burley, Jr., and against the respondent, Max Rieke & Brothers, Inc., and its insurance carrier, CNA, for an accidental injury which occurred April 13, 1995, and based upon an average weekly wage of $889.83, for 72 weeks of temporary total disability compensation at the rate of $319 per week or $22,968, followed by 207.64 weeks at the rate of $319 per week or $66,237.16 for a 58% permanent partial disability, making a total award of $89,205.16.

As of November 30, 1998, there is due and owing claimant 72 weeks of temporary total disability compensation at the rate of $319 per week or $22,968, followed by 117.57 weeks of permanent partial disability compensation at the rate of $319 per week in the sum of $37,504.83, for a total of $60,472.83 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $28,732.33 is to be paid for 90.07 weeks at the rate of $319 per week, until fully paid or further order of the Director.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of November 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Davy C. Walker, Kansas City, KS
Timothy G. Lutz, Overland Park, KS
Julie A. N. Sample, Administrative Law Judge
Philip S. Harness, Director